

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

FALCON ENTERPRISES, INC., a California  
Corporation; and FALCON FOTO, LLC, a  
California Company,

Plaintiffs,

v.

FCI INC., a Washington Corporation d/b/a  
FLYING CROCODILE INCORPORATED;  
ACCRETIVE TECHNOLOGY GROUP,  
INC., a Washington Corporation; ROSS  
PERKINS and JANE DOE PERKINS,  
individually, and the marital community  
composed thereof, and d/b/a Flying Crocodile  
Incorporated and/or Accretive Technology  
Group, Inc.; SHAWN BODAY and JANE  
DOE BODAY, individually, and the marital  
community composed thereof, and d/b/a  
Flying Crocodile Incorporated and/or  
Accretive Technology Group, Inc.; and DOES  
1-10,

Defendant.

No. CV07-0311 JCC

**DECLARATION OF MOSES  
LESLIE IN SUPPORT OF  
DEFENDANTS' MOTION FOR  
PARTIAL SUMMARY JUDGMENT  
DISMISSING CERTAIN CLAIMS  
AND AWARDED ATTORNEYS'  
FEES**

Noted On Motion Calendar:  
February 22, 2008

I, Moses Leslie, hereby declare under penalty of perjury under the laws of the State of  
Washington and the United States of America that the following is true and correct:

1. I am the Lead System Administrator for FCI, Inc. ("FCI") and in this capacity I  
am responsible for maintaining FCI's systems and servers. FCI is an Internet services  
company which owns and operates the PornParks website. PornParks is a "free hosting"

DECLARATION OF MOSES LESLIE IN SUPPORT OF  
DEFENDANTS' MOTION FOR PARTIAL SUMMARY  
JUDGMENT - 1

CASE NO. CV07-0311 JCC

118105.0010/1444088.3

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1 website that provides free web server space and network bandwidth to third-party users,  
2 which allows the users to create and operate their own websites.

3 2. FCI is the successor to "Flying Crocodile, Inc.," a company that was widely  
4 known in the Internet industry as "FCI" since 2001. FCI was incorporated on March 26,  
5 2001, effecting what was essentially a name change. FCI continued to do business under the  
6 trade name of "Flying Crocodile" following its incorporation. FCI is a wholly-owned  
7 subsidiary of Accretive Technology Group, Inc. The individual defendants (Ross Perkins and  
8 Shawn Boday) in this lawsuit are shareholders of Defendant Accretive. Mr. Perkins and Mr.  
9 Boday have never had any involvement or role in FCI's technical review of the websites  
10 created by users of PornParks.

11 3. On November 8, 2006, "Flying Crocodile, Inc." was listed as the Digital  
12 Millennium Copyright Act ("DMCA") designated agent of the PornParks website. The first  
13 notice by Plaintiffs of the infringements alleged in this lawsuit was addressed to FCI, Inc. at  
14 its present business address of 417 Virginia Street, Suite 200, Seattle, Washington, 98101.  
15 This is the same address listed on the DMCA designated agent form for receiving notice of  
16 alleged infringement on file with the United States Copyright Office. True and correct copies  
17 of plaintiff's notice of alleged infringement letter and the designated agent form are attached  
18 hereto as Exhibits A and B, respectively.

19 4. It appears clear from these actions by Plaintiffs that Plaintiffs knew the proper  
20 address and company to which their notice should be sent. In addition, Plaintiffs and FCI  
21 entities had several prior dealings with each other prior to the date of Plaintiffs' notice.  
22 Examples of these dealings are as follows. Plaintiff Falcon Foto and Flying Crocodile, Inc.  
23 entered into a non-exclusive license agreement on November 12, 1999 for the use of an 8x10  
24 image of a model for use in a Year 2000 calendar. Plaintiff Falcon Foto and Flying  
25 Crocodile, Inc. entered into another license agreement on October 2, 2000 that granted the  
26 non-exclusive use of rights to an unspecified number of images for various uses in connection

1 with the website www.sexspaces.com. A third license agreement between these parties and a  
2 former Flying Crocodile officer and shareholder granted the non-exclusive use of an  
3 unspecified number of images in connection with the www.sextracker.com and  
4 www.freehosts.net websites. Plaintiff Falcon Enterprises, Inc. and a d/b/a of Flying  
5 Crocodile, Inc. ("Flying Crocodile Sex Tracker") entered into a Non-Exclusive License  
6 Agreement for certain works in March 2000. A true and correct copy of this last agreement is  
7 attached hereto as Exhibit C.

8 5. Within about one hour of receipt of Plaintiffs' notice letter, FCI terminated the  
9 PornParks account of the user that uploaded the allegedly infringing images, and FCI  
10 removed all of the images from the Internet. Defendants obtained knowledge of the alleged  
11 infringements for the first time when it received Plaintiffs' notice letter on November 8, 2006.  
12 FCI and the other Defendants had no knowledge of the alleged infringements prior to this  
13 notification.

14 6. Potential users can visit the PornParks site and sign up for a free account by  
15 providing a username and password. Once a user creates an account, he or she can design and  
16 upload a website of his or her own. To do so, the user must use a File Transfer Protocol  
17 Client, a software program used to transfer files from a user's computer to a web server.  
18 Defendants do not re-arrange or otherwise move or manipulate any images or other features  
19 of a user's website.

20 7. By creating and maintaining an account, a user specifically agrees to adhere to  
21 PornParks' Acceptable Use Policy, which is accessible on the PornParks homepage. The  
22 Policy, as used in 2006 and as presently used (a true and correct copy of which is attached  
23 hereto as Exhibit D), expressly stated:

24 **Provision of Services**

1 PornParks will provide services on its host computing systems to customers in  
2 exchange for banner advertising on Customer's PornParks-hosted sites and  
3 compliance with this Acceptable Use Policy.

4 \* \* \*

#### 5 **Use of Internet Services**

6 Customer agrees not to use PornParks services to violate copyright or other  
7 intellectual property rights. For example, Customer may not upload or  
8 download commercial software in violation of software license agreements.  
9 Customer agrees to use the services provided by PornParks as permitted by  
10 applicable local, state, and federal laws. Customer agrees, therefore, not to use  
11 these services to conduct any business or activity that is prohibited by law.

12 \* \* \*

#### 13 **Illegal Material**

14 PornParks assumes no legal liabilities relating to Customer's use of [Free  
15 Host's] computer network and equipment. However, PornParks requires that  
16 its customers not use [Free Host's] network for illegal purposes.

17 \* \* \*

18 PornParks makes no representations concerning any attempt to review the  
19 content of sites hosted on its servers, and so PornParks is not responsible for  
20 the accuracy, copyright compliance, legality or decency of material contained  
21 in sites hosted on its servers.

22 The "Frequently Asked Questions" page of the PornParks site also expressly informs  
23 users that certain content is not allowed under any circumstances:

#### 24 **What is NOT allowed?**

25 \* \* \*

- 26 • **Unlicensed content** - - *all of the images on your site must be licensed for  
your use. Images posted on news groups and found on free sites are NOT "in  
the public domain."*

A true and correct copy of PornParks' "Frequently Asked Questions" page (including the  
form and content used in 2006 and presently) is attached hereto as Exhibit E.

1           8.       The following facts are true with respect to 2006, and are also true with  
2 respect to the present time and over the past several years. FCI did not actively monitor for  
3 infringing content the websites created by PornParks users (including the websites of the user  
4 involved in this lawsuit). When a user created a PornParks account and uploaded his or her  
5 website, FCI briefly reviewed it in an attempt to ensure that its technical functioning was  
6 correct. At the end of this process, a link chosen by FCI was automatically placed at the top  
7 of the first page of the user's website. No other links chosen by FCI were contained on users'  
8 websites. While the PornParks' users' websites vary considerably in style and content, the  
9 users' websites typically contained a number of other links chosen by and for the benefit of  
10 the user. FCI's brief technical review did not allow FCI to determine if a user had created a  
11 website with particular models, much less whether a particular image contained a copyright  
12 mark. Even if FCI could visually identify a copyright mark during its technical review, it  
13 would have no way of knowing if the copyright belonged to the user or if the image had been  
14 licensed to the user. The licensing of images is and was a very common business practice in  
15 the adult Internet industry. Once a user had agreed to the PornParks Acceptable Use Policy  
16 by promising, among other things, that he or she will not violate any copyright laws and FCI  
17 had completed its technical review, FCI typically did not review a user's website again. A  
18 user could, without any knowledge or notice to PornParks, post new photos on the user's  
19 website. If this occurred, FCI would never see the photographs at all. In this case, FCI and  
20 the other Defendants were completely unaware that the Subject Images allegedly infringed  
21 any copyright until Plaintiffs' notice of alleged infringements was received on November 8,  
22 2006.

23           9.       The PornParks site has a specific, functioning email address –  
24 abuse@pornparks.com – where abuse of PornParks' systems can be reported. This email  
25 address has been accessible from the PornParks site and has been continuously functioning  
26 since long before the alleged infringements in this case occurred. Once a complaint is

1 received, whether via the abuse@pornparks.com email address or through other means,  
2 PornParks identifies the specific user at issue and notifies the user of the alleged violation.  
3 PornParks then terminates the user's account if the complaint may have merit.

4 10. Under no circumstances whatsoever do Defendants tolerate any blatant  
5 infringement. All complaints are taken seriously and if evidence of potential infringement is  
6 found, the user's account is promptly terminated.


7 11. Plaintiffs have identified certain Internet addresses where the Subject Images  
8 were allegedly located. These identified Internet addresses were addresses of a number of  
9 separate websites created by one PornParks's user. I know this to be true based on my review  
10 of this user's account and his websites following FCI's receipt of Plaintiffs' notification letter  
11 dated November 8, 2006 (Exhibit A).

12 12. This PornParks user had numerous thumbnails of images on his websites. He  
13 had many more thumbnails on each of his websites than the typical PornParks' user's website.  
14 Each of these thumbnails could be clicked-through by an Internet surfer to allow the surfer to  
15 see a full-sized version of the particular image.

16 13. FCI and myself have made certain findings over the years regarding the  
17 volume of click-throughs which FCI is likely to obtain from its link on the top of the first  
18 page of a PornParks' user's website. We have found that this volume is not based on the  
19 quality of any images available on the users' websites. This volume is based primarily on the  
20 number of images or links that can be clicked-through on the user's website. We have  
21 determined that this is simply a situation where the higher the number of possible items a  
22 surfer can click on a given page, the less the chance that a surfer will click-through FCI's link  
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1 at the top of the first page of a user's website.

2 SIGNED this 31st day of January, 2008 at Seattle, Washington.

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5 Moses Leslie

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